

# DEFEND THE BAY

A CALIFORNIA NON-PROFIT CORPORATION - FOUNDED 1995

Defending Newport Bay and public areas from detrimental influences affecting ecology and public health.

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Arthur G. Baggett, Jr., Chair  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

June 14, 2002

Re: Comments on "Revision of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments" (Draft, April 2002).

Dear Mr. Baggett:

Defend The Bay appreciates this opportunity to provide these general comments on the State Water Resources Control Board's (SWRCB) "Revision of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments" (Draft Report). Along with these general comments, we have also submitted specific comments concerning listing Newport Bay and the Santa Ana River for impairment due to trash.

Overall, we support the State Board's efforts in developing an adequate and defensible Section 303(d) List. In particular, we support the addition of both Huntington State Beach (from Newland Avenue to the Santa Ana River) and Newport Beach (1000 feet down coast of the Santa Ana River) for bacteria. We also support adding San Diego Creek (Reach 1) and the Santa Ana Delhi Channel for fecal coliform. However, we are concerned about the Watch List, the TMDL "Completed" List, and delisting of impaired water segments.

- Impaired water segments should not be delisted.
- Upper and Lower Newport Bay should not be delisted for fecal coliform, nutrients or siltation.
- San Diego Creek (Reaches 1 and 2) should not be delisted for nutrients or siltation.
- The Watch List should be eliminated.
- The TMDLs Completed List should not remove waters from the 303(d) List.

## Actions Supported by Defend The Bay

Defend The Bay strongly supports the SWRCB's use of the 1998 303(d) List as the basis for the 2002 list. (Draft Report, Vol. I, p. 2). We also support the additions the SWRCB has made to the list. In particular, we support the addition of the Santa Ana Delhi Channel and San Diego Creek (Reach 1) for fecal coliform; and Huntington and Newport Beaches near the Santa Ana River for bacteria.

## No Delisting of Impaired Waters

However, we strongly oppose delisting any waters that are still impaired. The stated reason for delisting Newport Bay and San Diego Creek is "because TMDL has been incorporated into Basin Plan." Section 303(d) List Proposals – Santa Ana Region (8), at pp. 8-2, 8-3. Adoption of a TMDL does not mean the water segment is no longer impaired, and is therefore not sufficient grounds for delisting.

The purpose of the Clean Water Act is to clean up impaired waters. Waters are listed so that they may receive clean-up attention. Delisting a water segment should be cause for celebration, because it should mean the water is no longer impaired. However, certain delistings have been prematurely proposed, as those waters remain impaired.

Empirical assessment must be performed before any legal status (listing or delisting) is established. As discussed at the AB 982 Public Advisory Group (PAG) meetings, there is no basis in the Clean Water Act for delisting a water body simply because a TMDL has been written. We support the SWRCB's conclusion that "[o]nce it has been shown that standards are achieved and/or beneficial uses are attained the water bodies will be removed from this list." (Draft Report, Vol. I, p. 7). Thus, achieving the standards or beneficial uses is a precondition for delisting. This is the position approved by the vast majority of the members of the AB 982 PAG. Section 303 of the Act mandates that impaired waters be listed; it does not grant EPA authority to allow states to remove waters from the list while the impairment continues.

## One List, Not Three

We are concerned about the State Board's proposed actions to list impaired water segments on three separate lists: The Section 303(d) List, the Watch List, and the TMDLs Completed List. A three-list scheme runs contrary to the Clean Water Act and its implementing regulations. Section 303(d)(1)(a) provides that "[e]ach state shall identify those waters within its boundaries for which the effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters, taking into account the severity of the pollution and the uses to be made of such waters." 33 U.S.C. § 1313(d)(1)(A). Likewise, the implementing regulations contemplate only one comprehensive Section 303(d) List. 40 C.F.R. § 130.7(b). Thus, Section 303(d) mandates that all impaired water segments be placed on a single list: the Section 303(d) List.

In many if not all instances, the Watch List and TMDLs Completed List function to "delist" water segments from the 303(d) List. After all, the Staff Report states that the Watch List and the TMDLs Completed List "should not be considered part of the Section 303(d) list." (Draft Report, Vol. I, p. 7). As indicated above, the Clean Water Act and its implementing regulations do not contemplate the exclusion of water segments from the Section 303(d) List in the form of a Watch List and/or TMDLs Completed List. (Although proposed implementing regulations discuss "priority ranking" or "four-part [303(d)] list," the water segments in these subcategories are part of the Section 303(d) List. 33 U.S.C. § 303(d); 40 C.F.R. §§ 130.7(b); 130.27(a); (c)(1)). Most, if not all of the water segments on the Watch List should be listed on the 303(d) List. Since these segments are not on the section 303(d) List, the Watch List constitutes a delisting of these impaired water segments.

## Eliminate the Watch List

As discussed extensively at the last two PAG meetings, we have serious concerns about the use of a Watch List. Placing an impaired water body on any list other than a 303(d) list violates the mandate in Section 303(d), even if there is "a regulatory program in place to control the pollutant but data are not available to demonstrate that the program is successful." (Draft Report, Vol. I, p. 6).

The way the Watch List was developed and presented to the public in these documents is even more troubling in light of the environmental community's comments on the Watch List at the last two PAG meetings. One of the main concerns raised (other than that the list was illegal) was that the list would be used inappropriately; *i.e.*, to "park" water bodies for political or other reasons, where such waters should instead be on the 303(d) list and cleaned up. The Draft Report bears out the stated concerns. For example, under "SWRCB Review of RWQCB Recommendations" in Volume I, page 3, the report states that "the data and information used to support the placement of these waters on the Watch List are described in the RWQCB staff reports." What it does not say is that the majority of that information is apparently sparse at best, and much of it can be found only in the Administrative Record in Sacramento.

Even where data are available it is generally not clear how a water body qualified for the Watch List. For example, for waters on the Watch List because there is "insufficient information," there are no guidelines on what "insufficient information" means. The argument that they were placed on the Watch List so as not to "lose them" makes no sense; neither the environmental community nor staff are likely to forget about them, and putting them on a list with no basis in statute will not make them better priorities for monitoring money.

In order for all of the public to buy into the 303(d) process (which is necessary to its success), the state's decisions must be transparent. Particularly in light of the environmental community's repeated and vocal concerns about the Watch List, this lack of available information about its development significantly hinders any effort to obtain needed support for the statute.

## The TMDLs Completed List should not remove waters from the 303(d) List.

As it is currently proposed, the TMDLs Completed List has a similar delisting effect, and is likewise contrary to the Clean Water Act. As discussed at the AB982 PAG meetings, the Clean Water Act contains no basis for delisting a water segment merely because a TMDL has been written. Section 303 of the Act mandates that impaired water segments be listed; it does not grant EPA authority to allow states to remove water segments from the list while the impairment is continuing.

As discussed above, Section 303(d) of the Clean Water Act does not contemplate placing water segments on a separate TMDLs Completed List or delisting water segments once TMDLs have been established for the water segments. *See* 33 U.S.C. § 1313(d). Rather, Section 303(d) focuses on impaired water segments meeting attainment standards. Similarly, the regulations implementing Section 303(d) do not discuss placing water segments on a separate TMDLs Completed List or delisting water segments based merely on the fact that a TMDL has been calculated. 40 C.F.R. 130.7. In fact, 40 C.F.R. § 130.29(b)<sup>1</sup> directs that "you must keep

<sup>1</sup> Although 40 C.F.R. does not become effective until 2003, it functions as persuasive authority for development of the Section 303(D) List.

each impaired water body on your list for a particular pollutant *until it is attaining and maintaining applicable water standards for that pollutant*" (emphasis added). Similarly, 40 C.F.R. § 130.29(c) provides that states "may remove a listed waterbody for a particular pollutant *if new data or information indicate that the waterbody is attaining and maintaining the applicable water quality standards for the pollutant*" (emphasis added). The plain language of these regulations thus indicates that the only circumstances under which a water segment may be removed from the 303(d) List is when it has attained and is maintaining the proper standards. No provision is made for delisting merely because a TMDL has been established. It is therefore improper to place water segments on a Completed TMDL List that is not a part of the 303(d) List or delist water segments simply because a TMDL has been completed, unless the regional board, the State Board, and EPA determine that the water segments are attaining water quality standards.<sup>2</sup>

The water segments on the TMDLs Completed List should be on the 303(d) List, because they remain impaired. Placing them on a separate "Completed" List thus constitutes delisting from the 303(d) List. While we do not object to noting which water segments have completed TMDLs, we recommend such notation be incorporated into the Section 303(d) List itself. Alternatively, a separate TMDLs Completed List could be maintained, but water segments that are still impaired would remain cross-listed on the 303(d) List, despite having completed TMDLs. Such cross-listing would maintain the integrity of the 303(d) List, uphold the purpose of the Clean Water Act, and allow the Water Board to point out specific progress being made on the TMDL front.

### Reasons for List Deletions and Rejections Must Be Transparent

Volume I, Table 2 contains a list of proposed deletions from the 1998 Section 303(d) list. These reasons should be made readily available to the concerned public. Accordingly, we request that the SWRCB add a column to that table that briefly describes the reason for the delisting. In Region 8, for example, the SWRCB should describe why it proposes deletion of Upper and Lower Newport Bay for fecal coliform, nutrients, and siltation; deletion of San Diego Creek (Reaches 1 and 2) for Nutrients and Siltation; and Santa Ana River (Reach 3) for Nitrogen and Total Dissolved Solids.

Under "SWRCB Review of RWQCB Recommendations" in Volume I, page 4, the staff lists factors they "considered . . . in making recommendations." On this list are "source of pollutant" (# 12) and "availability of an alternative enforceable program" (# 13). Such variables may be interesting as background data, but they cannot be used to decide whether to list a water body, since they are completely irrelevant to whether the water body is impaired.

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<sup>2</sup> Placing water segments on a TMDLs Completed List and removing water segments with a completed TMDL from the Section 303(d) List contradicts EPA guidance. Specifically, EPA's 2002 Integrated Water Quality Monitoring and Assessment Report Guidance provides that a water segment with a completed TMDL may be removed from the Section 303(d) List (category 5) when TMDL implementation is "expected to result in full attainment of all standards." 2002 EPA Guidance at 6. EPA also endorsed this position in its previous 1994 guidance, in which EPA provided that states may "keep waterbodies on the Section 303(d) list, notwithstanding establishment of an approvable TMDL, until water quality standards have been met." 1994 EPA Guidance at 3. In the 1994 Guidance, EPA reasoned, "this approach would keep waterbodies on the 303(d) list for which TMDLs have been approved but not yet implemented, or approved and implemented, but for which water quality standards have not yet been attained. *Id.* Unless there is evidence that the water segments are attaining water quality standards and place water segments on a TMDLs Completed List that are not, at the minimum, meeting beneficial uses, especially when many TMDLs have lengthy implementation periods and any such delistings may be years in advance of any noticeable water quality improvement (*i.e.*, the Los Angeles River Trash TMDL as adopted by that regional board has an implementation period that spans more than a decade). Thus, an impaired water segment with a completed TMDL should remain on the 303(d) List at least until it attains water quality standards.

In addition, as noted above, we request clarification of the discussion in Volume I, p. 5. The "size affected" values for the 1998 list may change in the 2002 list because of new GeoWBS data. These changes must be summarized in a table in order to have meaningful public review and comment.

### Conclusion

In summary, we recommend a single 303(d) list, transparent listing criteria, and no delisting while a water segment is impaired. Also, we recommend greater transparency of the reasons for listing and delisting.

Thank you for the opportunity to provide these comments. We are as interested as the SWRCB in ensuring that the 303(d) list accurately reflect impaired water bodies in Region 8 and elsewhere. Should you have any questions, please do not hesitate to contact us.

Sincerely,



Robert Caustin  
Founding Director

Cc: Craig J. Wilson, Chief  
Monitoring and TMDL Listing Unit  
Division of Water Quality